No. 84-1667

In The

Supreme Court of the United States

October Term, 1984

—o—

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; AND GERALD E. HOSMAN,

Petitioners,

vs.

MATTHEW N. FRASER, A MINOR, AND E. L. FRASER, AS HIS GUARDIAN AD LITEM,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

BRIEF OF RESPONDENTS

—o—

SIMBURG, KETTER, HALEY, SHEPPARD & PURDY
2525 First Interstate Center
Seattle, WA 98104
Telephone: (206) 382-2600
By: JEFFREY T. HALEY
Counsel of Record

CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
Telephone: (212) 944-9800

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

In the Spring of 1983, Matthew Fraser was nearing graduation from Bethel High School. He was a member of the Honor Society and the Debate Team. He had been judged Top Speaker in state-wide debate competition both his junior and senior years and had won a leadership contest within the school. He was known among the students as an outspoken critic of the school administration both orally and in the student press. He had never been cited with a violation of school rules.[1]

As in most high schools, the student government conducted elections near the end of each year to choose officers for the coming year. Jeff Kuhlman, a candidate for vice-president asked Matt Fraser to give a nomination speech at a voluntary school assembly conducted by the student government for this purpose. With his audience clearly in mind, Matt Fraser composed the following speech, which included sexual metaphor aimed at those students who would choose to hear it:[2]

> I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds.

---

1. JA 45, 49, 51, 55, 64; Transcript 54; Petition B-29; Complaint ¶ 37, JA 10-11.
2. JA 46.

> Jeff is a man who will go to the very end, even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

Before presenting the speech, Fraser sought critical comments from the candidate, a few other students, and three teachers. Although two of the teachers recommended that he refrain from presenting the speech, none directed him to refrain, none suggested that its delivery might violate school rules, and none took any action to block its presentation. As agents for the administration, teachers are requested to enforce school rules and take action to avert impending violations. However, it did not occur to the teachers that presentation of this speech might violate the Disruptive Conduct rule.[3]

Although two teachers suggested that the speech was inappropriate for presentation at school, Fraser knew that two other students who had presented similar speeches in the past had not been charged with violations of school rules. At the same nominating assembly one year earlier, a student presented a speech containing a sexual reference and a four-letter word usually considered offensive. School officials responded only with more speech and did not impose any punishment.[4] Also a year earlier, another student published a creative essay in the school's literary magazine describing in detail, through metaphor and allusion, the conquest by a male, "by establishing a false sense

---

3. JA 30, 32, 50, 62, 89.

4. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

of security", of a female "enemy", including sexual intercourse. This essay is reproduced in the Joint Appendix at 13-14. The author was not disciplined and was a speaker at his graduation soon thereafter.[5]

At the assembly, Fraser's stride to the podium was accompanied by yelling and boisterous activity typical of nominating assemblies for student politics. Although his speech was punctuated by considerable applause and yelling, some of the students looked bewildered at certain points and seemed not to understand why others were applauding. The student government officer in charge of the meeting had no difficulty maintaining order and the succeeding speech was presented without delay.[6] Jeff Kuhlman won the election.[7]

The following morning, Matt Fraser was summoned to the office and presented with copies of five letters solicited from teachers by the Assistant Principal describing the speech and the assembly.[8] Based on the information in the letters, he was charged with violating the school's "Disruptive Conduct" rule which states:

> *Disruptive Conduct.* Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The Assistant Principal told Fraser that, because the sexual message was apparently intended, the speech was

---

5. Complaint an Answer ¶ 22, JA 7, 22.
6. JA 27-28, 35, 50.
7. JA 50.
8. JA 52, 67.

obscene within the meaning of the Disruptive Conduct rule and therefore a violation of that rule.[9]

Fraser was informed that he was suspended for three days and that his name would be removed from a list of eligible students to appear on the ballot for graduation speakers.[10] He had been specifically approved as a potential graduation speaker by school officials and a committee of students about three hours before he gave his fateful speech.[11]

Upon learning that Fraser was suspended and banned from speaking at graduation, several students posted placards in support of Fraser containing sexual innuendo such as "Don't Be Hard On Matt" and "Stand Firm Matt." These students were not disciplined.[12]

Fraser believed that he was punished for presentation of his speech, even though other students who presented more sexually explicit or offensive speeches were not, because certain school officials wanted to curb student criticism of the administration. He felt that, as a result of his accusing certain officials of improprieties, both verbally before other students and in the student press, the officials were looking for an opportunity to discipline him. This was the last chance before his graduation.[13]

Believing that his rights to freedom of speech had been violated, Fraser contacted an attorney who persuad-

---

9. JA 67-68.
10. JA 52.
11. JA 53, 70-71, 85-86.
12. Complaint an Answer ¶ 23, JA 8, 23.
13. JA 51; Transcript 54; Complaint ¶ 37, JA 10-11.

ed the school officials to reduce the suspension from three days to two.[14] To give the School District a chance to modify the decision before a legal action was filed, Fraser's attorney filed a Request for Grievance Review with the School District administrative offices, a copy of which is reproduced in the Joint Appendix at 15-19. The District chose to support its subordinate officials.[15] Fraser then filed in federal court a detailed complaint which is reproduced in the Joint Appendix at 3-19.

Before the first appearance in federal court, the school officials conducted the election for graduation speakers using a ballot which omitted Fraser's name. Nevertheless, Fraser received enough write-in votes to be elected as a graduation speaker. The school officials still maintained that he would not be allowed to speak at graduation.[16]

The trial was conducted before graduation and the court entered an injunction allowing Fraser to speak at graduation, which he did without incident. The court entered written findings and conclusions which are reproduced in the Petition at B-1 to B-10.

Although the court did not rule on all of the constitutional arguments raised by Fraser,[17] it ruled in his favor on three constitutional grounds and one separate state law ground. The court awarded $278 damages for the two days of education that were denied, as well as costs and attorney fees of $12,750.

---

14. JA 54, 86.

15. JA 105.

16. JA 59, 72.

17. E.g., Complaint ¶¶ 36, 37, 41, 42.

The Court of Appeals considered only two of the constitutional grounds and upheld the district court on both. In their Petition for Certiorari, the school officials have challenged all four grounds relied upon by the district court.

SUMMARY OF ARGUMENT

This case involves punishment of a student for delivering a speech containing sexual metaphors and puns to a high school political assembly. It does not involve behavior.[18] It does not involve obscenity or the use of offensive words. It does not involve disrespect toward teachers or other students.[19] It does not involve the maintenance of order or discipline within the school.[20] Nor does it involve speech which is reasonably likely to disturb the harmony of the educational setting, such as racial slurs.[21]

Rather, this case involves, solely, the propriety of using a sexual metaphor or pun as a rhetorical device in student political speech. The use of sexual metaphors

---

18. The school rule in this case does not relate to regulation of the length of skirts, type of clothing, hair style, or deportment. *Cf.* U.S. Br. 11.

19. *Cf.* U.S. Br. 8, 19; Brief of Texas Council of School Attorneys 9.

20. By contrast, New Jersey v. T.L.O., 469 U.S. —, 105 S.Ct. 733 (1985), involved enforcement of school rules related to drug use and violent crime. See T.L.O. at 105 S.Ct. 742. *Cf.* Brief of Texas Council of School Attorneys 9.

21. *Cf.* U.S. Br. 8, 18-19.

or puns is common in the everyday speech of both adolescents and adults. Sexual puns or metaphors are common in the classics of our literature (such as *Romeo and Juliet* and *Moby Dick*, see Addendum) which are taught in every high school in the land. Sexual puns and metaphors are frequently heard on radio and television. While school authorities are free to voice their displeasure with the use of sexual imagery by criticizing its use, they may not suspend a student merely because he steals a page from William Shakespeare and coins a sexual pun in a political speech.

It is, of course, one of the missions of education to inculcate the fundamental values of our society. In carrying out that sensitive task, however, educators must recognize that they are preparing students for life in a democracy in which freedom of expression is a fundamental value. In their zeal to impose on teen-agers Victorian canons of taste, which are not—and never have been—adhered to by any sizeable segment of our society, the petitioners inadvertently would teach an ugly lesson—that those in power can suppress the expression of those with whom they disagree. As required by freedom of speech principles for our larger society, those who disagree with student speech presented in a political assembly, including school officials, may of course respond with more speech, including sharp criticism or ridicule. But they may not use the power of their office to punish the speaker.

Under established jurisprudence, all speech is presumed protected by the First Amendment unless it falls within an identified exception. No federal court has yet identified an exception to the First Amendment which

would allow the allusive speech in this case to be prohibited. Even if a new exception for some speech in the high schools might be appropriate, it should not be established in this case. Such an exception should not include speeches delivered in the course of student politics, and it should not extend to mere sexual metaphor already widely present in the culture and indeed, the curriculum.

Nor would such a proposed exception be sufficiently precise to meet constitutional scrutiny in the area of free speech. Although schools are not required to draft their rules with the same precision as criminal statutes, both courts below were correct in ruling that the rule in this case, as construed after the fact, is unconstitutionally vague, violating rights to due process, and substantially overbroad, violating rights of free speech. Fair warning is simply not afforded where pure speech, which is neither obscene nor profane and is delivered at a student assembly convened for the purpose, is punished under a rule barring "[c]onduct which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures". In effect, the general exception to the First Amendment sought by petitioners is an open-ended power to ban speech merely because it appears "inappropriate" to someone in authority. Such a subjective standard of censorship cannot withstand First Amendment analysis.

———o———

ARGUMENT

I. Fraser's speech is protected by the First Amendment.

A. Previous First Amendment decisions leave Fraser's speech clearly protected.

This case involves an attempt to punish pure speech, not because it involved offensive or "dirty" words, but solely because its political message was marked by a modest sexual allusion appealing to an adolescent sense of humor. The student employed a timeworn rhetorical device — functionally and structurally indistinguishable from countless similar examples in the history of literature and politics[22] — to engage his audience in laughter and thereby make his point memorable. Off the school grounds, the speech would certainly be protected. The substantive First Amendment question presented is whether, under the facts of this case, school officials can punish the use of such a rhetorical device to dramatize a speaker's support for a candidate for student government.[23]

Speech is removed from the protection of the First Amendment only if it falls within a clearly defined exception to freedom of speech and is prohibited by a narrowly drawn regulation supported by a compelling state inter-

---

22. *See* Addendum.

23. The case also presents a question whether such allusions can be punished, consistent with the vagueness doctrine, under a rule proscribing "obscene, profane language." See Point II, *infra*.

est.[24] Three exceptions have been identified by the courts which are relevant to the consideration of this case.

First, *Tinker v. Des Moines Independent Community School District*[25] made it clear that school officials may prohibit and punish speech in schools which causes or threatens a material and substantial disruption of the educational process.

Second, some opinions of the courts of appeals suggest that school officials may censor certain speech that gives the impression that it carries the imprimatur of school authorities.[26]

Third, obscene speech is not protected by the constitution.[27] *Miller v. California*[28] established the appropriate test for obscenity, and *Ginsburg v. State of New York*[29] made it clear that this test varies according to the age of

---

24. Cohen v. California, 403 U.S. 20 (1971); Roth v. United States, 354 U.S. 476 (1957) (obscene expression not protected); Chaplinski v. New Hampshire, 315 U.S. 568 (1942) (fighting words not protected); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (expression which materially interferes with educational process not protected); Brandenburg v. Ohio, 395 U.S. 444 (1969) (expression inciting imminent lawless action not protected).

25. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

26. Seyfried v. Walton, 688 F.2d 214 (3rd Cir. 1981) (officials may censor school play), Trachtman v. Anker, 563 F.2d 512, 516 (2d Cir. 1977), cert. den. 435 U.S. 925 (distribution of sexually explicit questionnaire in school).

27. Roth v. United States, 354 U.S. 476 (1957).

28. Miller v. California, 413 U.S. 15 (1972).

29. Ginsberg v. State of New York, 390 U.S. 629 (1968).

the audience. Speech which is not obscene for adults might nevertheless be prohibited for children.

None of the three identified exceptions to the First Amendment apply to the humorous rhetorical device employed by Matt Fraser.

1. Fraser's speech did not materially and substantially disrupt the educational process.

Neither the petitioners nor the United States seriously contend that the *Tinker* standard was met here, and the findings of both courts below that there was no material disruption of class work, no substantial disorder, and no invasion of the rights of others, are plainly correct.

During the afternoon and the morning immediately following Fraser's speech, school officials solicited and collected five letters from teachers concerning Fraser's speech which are reprinted in the Joint Appendix at 94-99. These letters were presented to Fraser as notice of the charges against him when he appeared at the vice principal's office the morning after the speech. None of the letters mentioned disruption or described any facts which could be fairly characterized as a disruption of the educational process. Three of the letters suggested the speech was "profane" or "inappropriate"; a fourth letter, at 97-98, found nothing offensive about it; and the fifth, at 95, offered no comment.

The trial judge, acting as finder of fact, concluded that this speech did not cause a constitutionally relevant disruption of the educational process. Petition B-31 to

B-33. Based upon a *de novo* review of the record,[30] the Court of Appeals fully agreed: "the record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School." Petition A-17. Even the dissent below did not conclude that the speech caused a material and substantial disruption. Petition A-61 to A-63.[31]

That three students in the audience of 600 reacted with sexually suggestive movements does not justify the conclusion that Fraser's speech created sufficient disruption to allow its punishment. Pet. Br. 19. The freedom of speech recognized by *Tinker* would be meaningless if any student speaker could be punished merely because a few members of a large audience respond with distasteful symbolic speech.[32] Indeed, the audience's reaction here was less than would greet the showing of most movies teenagers watch.

Similarly, the speech was not materially disruptive because, as the trial court summarized a teacher's testimony, "[o]n the day after the speech was delivered, a

---

30. Petition A-10 note 2.

31. The dissent felt that the majority took "an overly constrained view of what constitutes 'substantial disruption' " and felt that courts should not be quick to second-guess school authorities. The dissent did not disagree that a "substantial disruption" had not been shown here. Petition A-60 to A-63.

32. For other cases where audience reaction was held insufficient to prohibit or punish speech, see Street v. New York, 394 U.S. 576, 592 (1969); Cohen v. California, 403 U.S. 15 (1971); Edwards v. South Carolina, 372 U.S. 229, 23233 (1963); Cantwell v. Connecticut, — ——— ——— (— –).

teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech." Petition B-3.[33] Presumably, the teacher recognized that any recent event can provide the spark of education. There is no evidence in the record suggesting that the speech engendered, even in this class, an atmosphere of irresponsibility or educational disorder.

Nor does the petitioners' claim that the ideas or images contained within the speech were disruptive to the educational processes going on within the minds of students have merit. Pet. Br. 19, 27. In effect, the petitioners are arguing that they may censor or punish, not particular dirty words as Fraser uttered none, but certain ideas and images being presented to students with sexual connotations. They seem to fear that once such pernicious ideas are planted in the minds of students, no amount of additional speech or reason will be able to counter their effects. But, it is inconceivable that Fraser could, in his three minute speech, cause such a pernicious effect upon the minds of other students that adult teachers could not effectively counteract it with more speech. In addition, schools do not generally attempt to ban allusions such as Fraser's from students' minds. The allusion here is indistinguish-

---

33. Furthermore, it is inappropriate for the school district to rely upon this incident as evidence to justify the punishment because it occurred after the school officials notified Fraser of his violation, gave him an opportunity for rebuttal, and imposed punishment.

able in content from those common in Shakespeare and other literature commonly taught to high school students.[34]

Fraser concedes that the "disruption" described in *Tinker* need not be physical. But it must be based on more than an unsubstantiated, amorphous, conclusory characterization of the effect of the content of the speech on the minds of students.

The United States suggests that the courts need not independently assess disruption because the school itself found it. U.S. Br. at 24. But the *Tinker* standard, like all constitutional standards, inevitably requires judicial application in the final analysis.[35] If the school can call whatever it chooses "disruption" within the meaning of *Tinker*, then *Tinker* means whatever the school says it means. That is not, of course, the law.

Even assuming that the school's assessment is entitled to substantial weight, it cannot be sustained in this case. The rule as applied defines "obscene, profane language" as disruptive before the fact, notwithstanding the particular speech or circumstances involved. It was applied not to language at all (much less obscene, profane language) but rather to ideas contained in quite decent language. Under this view, a student who reads aloud the parts of *Romeo and Juliet* or *Moby Dick* which are reproduced in the Addendum, or any other literature with sexual metaphors, could constitutionally be punished. Both

---

34. See Addendum.

35. *See*, e.g., Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); Miller v. Fenton, 54 U.S.L.W. 4022 (December 3, 1985).

courts below were plainly correct in rejecting such a conclusion and in holding that Fraser's speech was not disruptive in a constitutional sense.

2. Punishment of Fraser was not required to dispel any impression of approval by school officials.

Petitioners contend that school officials must have some latitude to dispel the impression that the school has authorized or approves of the speech. Pet. Br. 25. For the purposes of this case, Fraser need not disagree. Courts which have accepted this contention have applied it to speech generated as a part of the curriculum, such as newspapers produced in a journalism class[36] and school sponsored plays.[37] By contrast, student newspapers which are produced outside of the curriculum and do not create the impression that they are sponsored by school authorities are outside of this exception.[38] Where, as here, there is no impression that the school approved of or authorized the speech, or any such impression can be effectively dispelled by presenting more speech in the nature of disclaimers and repudiations, censorship and prohibition are

---

36. Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982).

37. Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981).

38. Thomas v. Board of Ed. Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2nd Cir. 1979) (school administrators could not punish students for publication of a newspaper which was produced and sold off school grounds and allegedly contained morally offensive, indecent, and obscene content).

not allowed because alternatives are available that are less restrictive of freedom of speech.[39]

The petitioners' claim that there was "a substantial risk that impressionable students (or parents) would perceive Fraser's [speech] as authorized absent disciplinary action", Pet. Br. 25, is untenable for two reasons.[40]

First, there is no activity on school grounds where the content of student speech is more disassociated from the educational program established by school authorities than student politics. The presumption by anyone who is remotely familiar with American concepts of democracy, including both impressionable students and their parents, is that the content of student political speech is developed by students for students. Within student politics, the common adversary is the school administration. The predictable expectation is hardly that student electioneering speech is the voice of school policy.

---

39. When the state has an important interest that conflicts with First Amendment protections, the state must, where there are alternatives, select the means of achieving its interest that is least restrictive of First Amendment rights. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). Two federal courts, while not allowing censorship or punishment for "vulgarity", allowed school officials to satisfy their asserted interest in dispelling the impression of approval of objectionable publications by attaching a disclaimer. Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973), *cert. den.*, 416 U.S. 995 (1974) and Koppel v. Levine, 347 F. Supp. 460 (E.D.N.Y. 1972).

40. Fraser's position that the punishment was not required to dispel impressions of official approval is supported by the United States in its amicus brief in Bender v. Williamsport Area School District (No. 84-773), argued (October 12, 1985), where the Solicitor General agreed that "high school students are mature enough to discern" "the difference between official endorsement and mere permission." U.S. Br. 23, 22.

Second, the school can quite easily present additional speech, to the students at an assembly or to the students and their parents in writing, repudiating and condemning the content of the speech. School authorities certainly control adequate means to communicate their message. The message might include a comment that the speech is protected by the First Amendment. Such a response would be educational for all of the students because it would demonstrate the battle of ideas contemplated by the principles of freedom of speech.

3. Current First Amendment doctrine does not allow prohibition of mere sexual metaphor in student speech.

A review of the record in this case shows that the teachers and school officials objected to this speech only because, in their view, it was "inappropriate", "indecent", "lewd", and "profane". See the letters from teachers regarding Frasers speech in the Joint Appendix (JA) at 94-99. Thus, the employee of the school district[41] who reviewed the matter at Fraser's request, stated: "The speech Matt delivered conveyed a sexual meaning that was indecent, lewd, and offensive to the modesty and de-

---

41. In their briefs, the petitioners and the United States make various references to the findings and conclusions of the school district employee who reviewed the case. E.g. Pet. Br. 3-5, 32; U.S. Br. 23. But, the school district's hearing officer was an employee of the district and in no sense a neutral third party. His findings and conclusions are entitled to no greater weight than the petitioners' pleadings. Even though he was not required to do so, Fraser filed a grievance with the school district to give the district a chance to reverse its decision before being compelled to appear in court.

cency of many of the students and faculty in attendance at the assembly." JA 102 ¶ 9. He concluded "Matt Fraser's speech was obscene within the meaning of the disruptive conduct rule and violated that rule." Joint Appendix 104 ¶ 4.

As the record shows, the response by the school district was clearly an attempt to prohibit public speech in school containing any references, even if merely allusive or humorous, to human sexual activity.

Although the teachers who initially complained about the speech addressed only the obscenity issue, and the school district employee who reviewed the violation and punishment relied primarily on obscenity grounds, the attorneys for the school district properly abandoned this justification for the punishment. The petitioners conceded before the District Court, the Court of Appeals, and this Court that the speech was not constitutionally obscene for high school students.[42] Even though *Ginsburg v. State of New York*[43] allows great latitude in finding a speech obscene for high school students, the petitioners apparently presumed that no court would find a speech which would be permitted on radio and television during regular hours and which contains nothing beyond the metaphors common to Sheakespeare and other great literature to be obscene for high school students.

The petitioners are essentially arguing that a new exception should be established which addresses the same topic and concern as the obscenity exception but which is

---

42. Petition B-15 to B-22; Petition A-9 to A-10.

43. Ginsberg v. State of New York, 390 U.S. 629 1274.

far broader and applies only in the schools. Pet. Br. 17-21. Under this exception, the petitioners would apparently prohibit any reference to human sexual activity, by denotation or connotation, in public speech within the schools.[44]

Petitioners claim that such an exception is supported by analogy to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which allowed the FCC to prohibit the use of patently offensive words during regular hours on radio broadcasts. But *Pacifica* did not suggest a broad prohibition on sexual metaphors or on speech allusively referring to human sexual activity. It is one thing to ban particular offensive words, and quite another to broadly prohibit, as Bethel implicitly claims to have done, all sexual metaphor. Nothing in *Pacifica* or current First Amendment doctrine permits the punishment of students for using in student assemblies metaphors, not indecent words at all, no different than those they are asked to read in English or Drama classes, or permits schools to monopolize the allusive and harmless reference to a field of human conduct as important to young adults as human sexuality.

Indeed, there are holdings and dicta in numerous cases to the effect that student speech at school on the topic of human sexual activity is protected by the First

---

44. The petitioners have found no published decisions of any court of the United States that, absent obscenity, would allow prohibition of this kind of speech.

Amendment,[45] provided, of course, it is not obscene, is not disruptive, and does not create an undispellable impression it is authorized or approved by school authorities. If the Court establishes a new exception to the First Amendment for the kind of speech presented in this case, the statement of the law contained in all of these cases will be effectively overruled.

---

45. Papish v. Board of Curators, Univ. of Missouri, 410 U.S. 667 (1973) (campus newspaper containing vulgarities and offensive cartoon, but not obscene, held protected expression); Kois v. Wisconsin, 408 U.S. 229 (1972) (underground newspaper containing indecent, but not obscene, photo and poem, held protected); Jacobs v. Board of School Commissioners of City of Indianapolis, 490 F.2d 601 (7th Cir. 1973), dismissed as moot, 420 U.S. 128 (1975) (vulgar, but not obscene, expression in unofficial student newspaper held protected); Scoville v. Board of Education of Joliet Township, 425 F.2d 10 (7th Cir. 1970) (inappropriate indecent, but not obscene, language in underground newspaper held protected); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973) (vulgar, but not obscene, language in campus magazine held protected); Sullivan v. Houston Independent High School District, 333 F.Supp. 1149 (S.D. Tex. 1971) (vulgar, but not obscene, language in student newspaper held protected); Vail v. Board of Education of Portsmouth School District, 354 F.Supp. 592 (D.N.H. 1973) (profane, vulgar, but not obscene, language in publication distributed on school grounds held protected); Frasca v. Anders, 463 F.Supp. 1043 (E.D.N.Y. 1979) (vulgar, but not obscene, language in letters published in school newspaper, held protected); Koppel v. Levine, 347 F.Supp. 456 (E.D.N.Y. 1972) (indecent, but not obscene language in newspaper held protected); Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043 (2nd Cir. 1979) (offensive, indecent, but not obscene, language in off-campus student newspaper held protected); Gambino v. Fairfax County School Board, 429 F.Supp. 731 (1977), affirmed per curiam 564 F.2d 157 (1977) (article about sexual activity and contraception in official school newspaper considered objectionable by school officials held protected expression).

B. The Court should not establish a new exception to the First Amendment in this case.

Recognizing that established doctrine does not permit the punishment of Fraser's use of sexual metaphors in the context of a student political assembly, both the petitioners and their amici request the Court to establish a new exception to permit the punishment inflicted here. The petitioners seek an exception broadly covering "indecent student speech". Pet. Br. 17-27. The United States, even more broadly, would allow prohibition of any speech "if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint." U.S. Br. 20.

In our view, the petitioners and their amici seek an advisory opinion from the Court far more broadly formulated than the facts of this case warrant. The question presented here is not whether schools may go beyond *Tinker* to instill standards of civility and decency for students, whether the school may require the use of certain forms of address in the classroom,[46] or whether it may

---

46. The United States argues that schools must be allowed to insist "teachers be addressed as Mr. or Mrs. and that some suitable form of address be used toward students themselves during class discussion". U.S. Br. 19. Fraser does not contest this view because the purpose of the classroom setting requires some restrictions upon freedom of speech.

ban the use of racial epithets or religious slurs at school.[47] Instead, the issue before the Court is relatively narrow: does the First Amendment permit schools to punish, without clear standards, a high school student for presenting a speech, upon invitation, at a student political assembly, containing no indecent language whatsoever, merely because it contains sexual metaphor of a sort indistinguishable from that used throughout high school curricula in every state in the nation.

1. The First Amendment must apply in the schools to ensure the protection of free speech values.

Students have rights of freedom of speech in the schools, recognized in *Tinker*, not by mistake but for a

---

47. The United States repeatedly parades the bogey of racial slurs in an attempt to highlight the need for school regulation of student speech. Of course, racial slurs are the quintessential example of speech which would be regulable under *Tinker*, under a proper showing that the school's learning environment would be materially disrupted by its utterance. *Compare Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966) (First Amendment does not permit prohibition of wearing of "freedom buttons" where school did not show impairment of school activities) *with Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) (suppression of "freedom buttons" justified on showing of unusual degree of commotion, boisterous conduct, collision with rights of others, and undermining of authority.) The striking and justly celebrated pairing of *Burnside* and *Blackwell* carefully applying the correct First Amendment analysis to similar conduct but reaching different results based on the facts of each case, was heavily relied on by this Court in *Tinker*, 393 U.S. at 509, 513. In appropriate situations, racial epithets and religious slurs may also be prohibitable as "fighting words", *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1943), or expression inciting imminent lawless action, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

reason. The principles of freedom of speech are important foundations of our society and system of government. If the principles of freedom of speech are not taught in our high schools, many citizens in our society will never learn them. Students can hardly learn the principles of freedom of speech unless they are allowed to practice them and see how they work. The State of Washington recognizes the importance of freedom of speech in the schools by giving students full rights to freedom of speech under state law.[48]

A key principle of freedom of speech is that the appropriate remedy against speech containing ideas or language that others find abhorrent or distasteful is more speech. The content of the original speech will then receive the acceptance it deserves in the marketplace of ideas.

---

48. The Washington Administrative Code, section 180-40-215 (1983), provides:

> In addition to other rights established by law, each student served by or in behalf of a common school district shall possess the following substantive rights, and no school district shall limit these rights except for good and sufficient cause:
>
> . . . .
>
> All students possess the constitutional right to freedom of speech and press and the constitutional right to peaceably assemble and to petition the government and its representatives for a redress of grievances, subject to reasonable limitations upon time, place, and manner of exercising such right.
>
> . . . .
>
> The foregoing enumeration of rights shall not be construed to deny or disparage other rights set forth in the constitution and the laws of the state of Washington or the rights retained by the people.

Of course, the very purpose of school requires restraints upon student freedom of speech in the classroom and certain school sponsored activities. But, to transmit the values of our democratic society, rights of free speech in other school contexts, especially student politics and independent student press, the core of free speech, must function like a model of the larger society. Although certain student speech might be prohibited and punished in the context of classrooms and other school activities, student speech in the context of a voluntary political assembly must be granted full protection.

This does not mean that school officials should not respond to abhorrent or distasteful speech in the contexts where freedom of speech must apply.[49] To the contrary, to teach students the values of our society, school officials have a duty to criticize and condemn the use of such speech. But, absent actual or likely disruption of the educational process, student speech in these contexts must be met in

---

49. In their Brief at page 27, the petitioners assert that "unfettered student expressive activity of an indecent or offensive character thwarts the educational goals of teaching students socially responsible standards of behavior and respect for others' sensibilities." Fraser is not suggesting that all student expressive activity in voluntary non-curricular settings should be unfettered. In this case, such expressive activity may be fettered by the challenge of defending the students' ideas and views on propriety to the teachers and other students. It may be fettered by social or academic disapproval. But it must not be fettered by official punishment

the marketplace of ideas rather than with the heavy hand of punishment by government agencies.[50]

The requirement that government respond by more speech, rather than by proscription, can hardly have more urgent application anywhere than in school, especially as regards the irreverent and innocuous kinds of metaphors at issue here. Whether in or out of school, all high school students are inevitably and constantly exposed to the values and ideas on propriety represented by sexually suggestive speech. Students cannot be isolated from these influences. Well-known statistics demonstrate, for good or bad, that sexuality (indeed, widespread pregnancy) is hardly a forbidden territory to high school students, not just in speech, but in practice. If the school authorities wish to accept the challenge of teaching the values of our society, they must present their opposing views to the students. They cannot force students to pretend that mere sexual allusion is *terra incognita*. School authorities cannot hope to persuade the students of their views by simply punishing students who disagree with them.

---

50. A response by school officials with more speech directed to the speaker, to the audience, or both, will achieve two educational objectives. First, it will teach all the students about principles of freedom of speech, a basic societal value. Second, attempts to persuade the students that certain speech is inappropriate within our society are likely to be more effective in shaping the views of those students than punishment.

    And, as a practical matter, school officials can more than adequately control the problem of the use of sexual metaphor in student speech through techniques of persuasion without using suspension.

2. Even if a new exception were appropriate for some settings, it should not extend to presentation of political speeches by students.

The strenuous suggestion by petitioners and their amici that the student assembly was an aspect of the school's curriculum indistinguishable from classroom activities is inconsistent with this Court's analysis in *Board of Education v. Pico*.[51] In *Pico* the Court carefully distinguished the case before it, involving the removal of a library book, from cases of either book purchase, curricular choice in the classroom, or teacher or student speech. It is relevant here that Fraser was punished not for a disrespectful vulgar remark in a classroom but for electioneering speech in a voluntary student assembly.

The basic notion that what is appropriate speech during class is not the proper measure for all school activities has recently been relied on by Congress. Exercising its power to enforce the First Amendment under Section 5 of the Fourteenth Amendment, Congress recognized in the Equal Access Act[52] that speech which school officials could prohibit (and, in some cases, must prohibit) in classrooms may well be protected by the First Amendment in other school settings.

If distinctions can be drawn between various voluntary, non-curricular student activities to determine which are most entitled to full freedom of speech protection, certainly political assemblies should receive the greatest

---

51. Board of Education v. Pico, 457 U.S. 853 (1982) (plurality opinion).

52. Equal Access Act, Pub.L. 98-377, Title VIII, 98 Stat. 1302.

protection.[53] Protection of freedom of speech within the political arena is a core First Amendment value.

The most essential ingredient in any democratic process is the presentation of uncensored speech. The appropriateness of such political speech is to be judged by the voters, who, in this case, elected Fraser's candidate and then elected Fraser to speak at graduation. To say that the school administration, the popularly perceived common adversary of the students, can ban from student political speech use of rhetorical devices that would be permissible in speech off campus to the same group, would give the students an erroneous understanding of the First Amendment and deny the students even the illusion that they have a significant political voice before the administration.

---

53. The petitioners argue, at 12-13, that the Court of Appeals misapplied "forum analysis" from Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983), and Cornelius v. NAACP Legal Defense and Education Fund, — U.S. —, 105 S.Ct. 3439 (1985). To the contrary, as the United States apparently agrees, "forum analysis" was not relevant to the Court of Appeals decision. In our view, the Court's "forum analysis" focuses on whether a speaker will be afforded access to a particular forum, not whether he may be prohibited from using certain forms of speech once admitted as a speaker. For example, it was irrelevant that, in Tinker, the classrooms were certainly not public fora for the entire school day.

However, if forum analysis is applied to this case, this political nominating assembly was clearly an open forum by designation, limited to use by students. This forum was not primarily intended for a government purpose other than as a medium of communication by, to and for students. As "a content-based prohibition"—as the United States concedes it is, U.S. Br. 20—the school rule in question "must be narrowly drawn to effecuate a compelling state interest." Perry, *supra*. As shown elsewhere in this brief, the rule in question is neither narrowly drawn nor in furtherance of a compelling state interest.

Widmar v. Vincent[54] holds that if college students are allowed to voluntarily assemble on campus, they must be allowed to discuss any topic they choose, including religion. In order to make this right meaningful, the students must be free to use any language or rhetorical devises, short of obscenity, that they choose. And, as the United States argued in *Bender v. Williamsport Area School District*, senior high school students should have the same freedom as college students to discuss any topic they chose.[55]

3. The sexual metaphors at issue here pose no real threat of harm to senior high school students.

The United States contends that, in considering whether a speech is protected by the First Amendment or falls within the disruption exception, courts and school officials must consider whether the speech "disrupts school officials' efforts to inculcate basic standards of civility and decency". U.S. Br. 16. Later in the same paragraph, the government claims that "indecent speech disrupts the work of the school." In effect, the government is contending that the ideas and values represented by sexually suggestive speech, in themselves, are harmful to the education of the students.

Similarly, at page 27 of its brief, The National School Boards Association states a principal concern of the petitioners and their amici, that the values and ideas contained in certain speech permissible for adults may be harmful to the welfare of children. These concerns are

---

54. Widmar v. Vincent, 454 U.S. 263 (1981).

55. U.S. Br. 22-23.

tempered by three considerations. First, because the test for obscenity for children is different than the test for obscenity for adults, the speech would be properly characterized as obscene if there were a significant potential that the ideas or values represented by the speech could be harmful to children. But as previously noted, applying the variable test for obscenity as to high school students, the District Court found the speech was not obscene. Petition B-8. This finding has not been, and cannot be, questioned.

Second, the audience did not contain young children. This was a group of senior high school students where many of the seniors were already of voting age, eligible to participate in our democratic process and required to register for the draft.

Third, whether or not some speech, such as the speech given by George Carlin in *Pacifica,* might be said to be harmful (and without substantial value as well), the same can hardly be said about sexual metaphors generally, or more specifically the irreverent, humorous, innocuous kind of metaphor used here.[56] Certainly, the United States would not suggest barring Shakespeare, Melville, or similar authors who use sexual metaphors from high school curricula. Human sexuality is not an unfamiliar topic for senior high school students. Awareness of, interest in,

---

56. Although the petitioners presented the testimony of a so called "expert", an employee of another school district, who opined that the speech was harmful and demeaning to female students as well as male students, JA 77-82, this testimony was not credible and was given no credit by the District Court, JA 81-82. There is no evidence in the record that any students found the speech objectionable.

and reference to sexual topics is inescapably part of being a teenager.

4. Prohibition of this "indecent" speech is not viewpoint neutral.

As conceded by the amicus United States, the prohibition in this case is based on content and is not "viewpoint neutral." U.S. Br. 20-21. The record indicates that many of the students believed Fraser's use of sexual metaphor in his speech was appropriate. This view was one of the messages in Fraser's speech. Another message in his speech, which the sexual allusion communicated particularly well, was: "I am willing to stand up against the administration by saying something that you will find witty and amusing, but the administration will find objectionable. My candidate will be equally courageous in dealing with the administration." A third message in the speech was that Fraser's candidate has strengths that are associated with youthful vigor and virility. JA 46, 55. Application of the disruptive conduct rule to Fraser's speech discriminated against presentation of these three views.

In addition, Fraser believed, and alleged in his complaint, that school officials chose to punish him to silence his criticism of the administration and, by example, dissuade other students from voicing such criticism.[57]

---

57. Approximately one year earlier, another student published an essay in a school literary magazine which, through sexual double meanings, described in detail the sexual conquest of a female by a male, including sexual intercourse. A copy of the essay is reproduced in the Joint Appendix

(Continued on following page)

5. The proposed exception would not have sufficiently clear standards.

Exceptions to the guarantee of freedom of speech must be defined by clear and narrow standards so that protected

---

(Continued from previous page)

at 13-14. This student was not punished and was a speaker at graduation. Complaint and Answer ¶ 22, JA 7, 22.

Also one year earlier, in the same annual nominating assembly for student government, another student gave a nomination speech containing a sexual reference and four letter words. School officials summoned him to the office to discuss the matter, but he was not suspended or otherwise punished. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

Following Fraser's suspension, some students put up posters and placards in support of Fraser that contained sexual references. The students were not subjected to disciplinary action. Complaint and Answer ¶ 27, JA 8, 23.

Based in part on this evidence, Fraser contended that he was singled out for enforcement of the disruptive conduct rule, while the other students were not punished, because he was an outspoken critic of the school administration through editorials in the student newspaper and personal confrontations with gatherings of other students. JA 51; Transcript 54; Complaint ¶ 37, JA 10-11. Fraser believed that school officials wanted to silence him and dissuade other students from following his example. He believed this occasion was selected because it was the closest he came to violating school rules and it was the last chance before his graduation.

Before the District Court, Fraser claimed that, like the students in Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), he was singled out for punishment to suppress expression of his views. Fraser argued that, although selective enforcement of regulations by officials is generally permissible, selective enforcement to suppress particular expression infringes rights of freedom of speech. *Tinker* at 511. This issue was not decided by either court below. Accordingly, if the Court disagrees with the judgment below, remand is required to address this unresolved claim.

speech will not be chilled by fear of transgression and so that public officials will not be allowed to restrict freedom of speech in an arbitrary or discriminatory fashion.[58] The standard for a new exception proposed to the Court of Appeals, "indecency", was rejected as too "amorphous". Petition A-30. The standard offered by the dissent, "indecent and vulgar", Petition A-60, is no better.

Neither the petitioners nor their amici have advanced an adequately clear and narrow standard for their proposed exception to the First Amendment. The petitioners, in fact, suggest no standard whatsoever. Pet. Br. 28. The United States argues that regulation of student speech in high schools should be permitted if officials have "a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint." U.S. Br. 20. This standard is far too vague and too broad.

What is "an atmosphere of civility"? As judged by whose values? Why is civility threatened by Fraser's speech but not by Shakespeare's "The bawdy hand of the dial is now upon the prick of noon", *Romeo and Juliet*, II, iv, 119? How can school officials or judges know what are basic societal values"? If a value is held by a bare majority, is it basic, or is a super-majority required?

What amounts to suppression of a political viewpoint? As discussed above, Fraser used this rhetorical device to

---

58. Miller v. California, 413 U.S. 15, 23-24 (1973); Cohen v. California, 403 U.S. 15 (1971); Chaplinski v. New Hampshire, 315 U.S. 503 (1969).

express a political viewpoint, concerning the willingness of his candidate to disagree with the school administration, that could not have been as effectively and efficiently communicated by any other means. Is this not the suppression of a political viewpoint?

The standard proposed by the United States is too broad because it would allow regulation of speech on any disputable topic that is related to "civility" or "basic societal values" and is not clearly political. For example, speech that represents differing views on such issues as forms of address outside of classrooms, whether men should hold doors for women, table manners, belief in God, and saluting the flag, all fall within its scope.

The proposed standard is too broad because it would apply equally in all school settings, including the settings outside the classroom and similar school functions where petitioners and their amici have conceded that students have rights to freedom of speech. Also, the proposal would allow proscription of all allusions, connotations, metaphors, and references to the very condition of men and women as sexual beings, as well as literature such as that listed in the Addendum. It does not even include a distinction between intended connotations and unintended connotations perceived only by the listener.

The standard proposed by the United States is not a standard at all. It would give school authorities broad discretion to prohibit speech without considering the effects on the rights of students.

6. For constitutional purposes, this case does not involve a captive audience.

The petitioners assert that school officials can prohibit speech with sexual connotations at student political assemblies to protect students in the audience who may have been offended by the speech. This argument is meritless.

Unless each listener has previewed the speech, every listener to an oral speech is, to some extent, "captive". At least until the listener can escape the audible range of the speaker, each listener must hear what the speaker has to say.[59] But the Court has never accorded constitutional significance to ordinary degrees of captivity.

In this case, the audience was no more captive than any audience that voluntarily attends a gathering for the presentation of speeches in a confined space. Because a political nominating speech the year before contained indistinguishably "indecent" language, Fraser's rhetorical device was not unforeseeable for this forum. Any student who preferred to avoid the colorful, popular styles of adolescent speech could have attended a study hall instead of the assembly. Under these circumstances, the interests of the audience in not being "subjected" to speech indistinguishable from that encountered in curricular works, on television, and indeed throughout the culture, can hardly justify punishment of Fraser for giving this speech.

---

59. See Cohen v. California, 403 U.S. 15 (1971).

In fact, the record contains no evidence that any students were offended.[60]

7. This case does not involve the state interest in controlling the presentation of information on sexuality to children.

The petitioners assert that the presentation by schools of information on human sexuality, commonly called sex education, is a delicate topic on which there is a diverse range of parental attitudes and expectations, and that presentation of such information in an irresponsible fashion can have harmful effects on adolescents. Pet. Br. 23-24. Fraser does not dispute these generalizations. However, they are wholly irrelevant here for two reasons.

First, although the state is free to regulate carefully the manner in which its employees present information on sexual topics to students, as suggested by the Administrative Rule of the Board of Education cited by petitioners at page 24, this does not suggest that the state may regulate speech on this topic by students, who are not state employees, to other students.

Second, Fraser's speech does not concern sex education or presentation of information on human sexuality. It was no more graphic, informative, or misinformative than speech that is regularly presented on radio, on television, in magazine ads, and in innumerable materials in the school library.

---

60. The testimony of the employee of another school district cited by petitioners only suggests that, in her view, some of the female students *should* have been offended. Pet. Br. 22-23.

8. The need for local control over school rules does not justify the proposed exception.

The petitioners suggest, at pages 24 and 35, and the amicus National School Boards Association asserts, at 28, that the parents within the local community should set the standards for acceptable and unacceptable speech within the schools. While such local authority to set school rules may be appropriate for many subjects, a group of parents who happen to be influential or in the majority cannot be allowed to establish rules which infringe upon freedom of speech. One of the essential purposes of the Bill of Rights in the U.S. Constitution is to protect the rights of individuals against infringement by others who happen to be powerful or in the majority.

II. The Disruptive Conduct rule used to punish Fraser is overbroad as construed, violating rights of free speech, and unconstitutionally vague as applied, violating rights of due process.[61]

A. As applied, the disruptive conduct rule is unconstitutionally vague.

The petitioners argue that the Constitution permits them considerable flexibility in the precision required for

---

61. While the school's Disruptive Conduct rule is constitutionally infirm as construed and as applied, it need not necessarily be rewritten. The complaint did not seek, and the District Court did not undertake, invalidation of the rule on its face. The rule could be saved by a new construction from the School District limiting its application to speech which is actually disruptive of the educational process.

school rules.[62] Fraser agrees that school rules need not be drafted with the same specificity as criminal statutes. However, as will be shown below, the rule in this case did not even meet the petitioners' proposed standard of "sufficient to give Fraser fair warning", Pet. Br. 32, and gives school officials insufficient guidance to allow the rule to be applied with uniformity.

Even though the standard may be quite lenient for school rules generally, the standards for rules which restrict the fundamental right of free speech must be strict.[63] However, the school's disruptive conduct rule does not meet even the most lenient standard because, giving the words of the rule their plain meaning, the rule clearly should not apply in this case for two reasons.

First, without any ambiguity, the rule only prohibits "[c]onduct which . . . interferes with the educational process", and Fraser's speech did not cause any such in-

---

62. The petitioners cite Goss v. Lopez, 419 U.S. 565 (1975), and New Jersey v. T.L.O., 469 U.S. —, 105 S.Ct. 733 (1985), which were cases involving procedures to enforce school rules rather than alleged vagueness of a school rule.

At pages 30 and 31, the petitioners quote extensively from Arnett v. Kennedy, 416 U.S. 134 (1974), in support of their contention that "catch-all" clauses are sufficient to meet due process requirements. However, Arnett does not support the petitioners' position because the case dealt with rules for government employees rather than for students. Certainly the constitutional limitations on government discipline of its own employees, where the government is acting much like a private employer, are much more lenient than constitutional limitations on the government treatment of private citizens.

63. Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967).

terference. To avoid this problem, the petitioners interpreted the rule as saying that all "obscene, profane language" on school grounds is *per se* an interference, whether or not there was an actual interference. JA 103 ¶ 3, 104 ¶ 4; Pet. Br. 32. The rule does not give fair warning of this interpretation because the interpretation is inconsistent with the plain meaning of the title and the first clause of the rule.

Second, Fraser's speech did not include any language which can fairly be considered obscene or profane. Even if these words are given a very liberal interpretation, the term "language" refers to the denotations of the words and phrases used, not the connotations, which are subject to interpretation by the listener. The rule gives no warning at all that it applies to ideas, images, or sexual metaphors. To the contrary, it rather plainly refers to dirty words.[64]

---

64. That the school's hearing examiner subsequently construed the rule as including "indecent, lewd" language, in reliance on the Random House Dictionary of the English language, see Pet. Br. 5, is quite irrelevant. The question is what warning the phrase "obscene, profane language" provided Fraser, and what limits it imposed on administrators so that students would not be subject to discipline in their standardless discretion. *See, e.g.*, Kolendar v. Lawson, —— —— —— (——); Lovell v. Griffin, 303 U.S. 444, 450-53 (1944). The Random House Dictionary's definition of "obscene" as "indecent" is quite unusual. *See, e.g.*, Webster's Seventh New Collegiate Dictionary 582 (1966) ("REPULSIVE", "designed to incite to lust or depravity").

It requires no super-human feats of administrative foresight to bar "indecent speech" or "reference to sexual activity", if, that is what schools seek to do. A prohibition of "obscene, profane language", by contrast, announces an intention to do something far narrower.

The petitioners wish to prohibit much more than just offensive words, as in *Pacifica*,[65] but they are attempting to do so with a rule that is much narrower than the statute in *Pacifica*. In *Pacifica*, the monologue, "Filthy Words" was found not obscene or profane, but only indecent. It fell within the scope of a statute which expressly prohibited the use of "indecent" language.[66] The words "obscene" and "profane" cannot be stretched to apply in this case without seriously damaging *Pacifica*.

This is not a case, however, where the determination of the rule's vagueness as applied to particular speech need to be made in the abstract. The facts of this case demonstrate that no student could have received fair warning from this rule.

First, at the same assembly in the previous year, a student gave a speech with similar allusions and was not punished.[67]

Second, Fraser actually read the speech to three teachers, in advance, seeking their counsel in the best educational tradition. Teachers are a natural source of guidance for possible rule violations. None of the teachers suggested that it would, or might, violate any school rule, even though the teachers are charged with enforcement of school rules. JA 30, 32, 50, 62, 89. The teachers themselves were unaware that the speech might violate a school rule. Although two of the teachers indicated that the speech was inappropriate, the third did not; and none provided any warning. When asked how a lay person

---

65. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

66. 18 U.S.C. § 1464, *see* 438 U.S. at 731.

67. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

might be able to discern what is considered "disruptive" at Bethel High School, the vice principal said: "We don't expect them to." JA 76. Under these circumstances, it is plain that Fraser himself could have had no fair warning, and school officials received neither guidance for applying the rule nor limitations upon their discretion.

Indeed, the due process point is somewhat stronger than that. It is fundamentally unfair to punish Fraser for giving a speech which was reviewed in advance, where the teachers neither warned him not to give it nor directed him to refrain from giving it.[68]

B. As construed, the disruptive conduct rule is overbroad in that it prohibits speech which is protected by the First Amendment.

As interpreted by the school district, the school's disruptive conduct rule seriously infringes two kinds of student speech that are clearly protected.[69]

First, as construed, "obscene, profane language" on school grounds is prohibited, whether or not it is disrup-

---

68. Cox v. Louisiana, 379 U.S. 559, 571 (1965) (due process violated where state convicts "a citizen for exercising a privilege which the state clearly told him was available to him"); United States v. Pennsylvania Industrial Chemical Corporation, 441 U.S. 665, 670-75 (1973) (same).

69. At page 33 of their brief, the petitioners suggest that a rule is not overbroad if "it is viewpoint neutral on its face and seeks only to further legitimate goals in the educational environment." The petitioners misconstrue the doctrine of overbreadth. In any case, Fraser has shown in previous parts of this brief that the school district used the broad language of the disruptive conduct rule to suppress expression of his views.

tive to the educational process or occurs within curricular or similar settings. JA 104. There is no exception to the First Amendment which would allow the school to prohibit the non-disruptive use of profanity or "indecent" language between two consenting students in the school yard.

Second, the school district has ruled that obscene means "offensive to modesty or decency; indecent, lewd." JA 103. But speech which falls in these categories without being legally obscene or disruptive is protected by the First Amendment for use in most school contexts. Many statements between students might be considered "offensive to modesty", including such statements as, "I would like to see you in a bikini."

As construed, the rule sweeps far beyond dirty words to authorized punishment for sexual metaphores generally, or allusive reference to any sexual subject Any rule which applies to cover the kinds of references and metaphors which recur throughout literature (see Addendum), on television, and generally in the life of teenagers and adults is far too expansive.

III. Petitioners' additional claims are either moot or inappropriate for resolution here.

Petitioners argue that the District Court erred in holding that the removal of Fraser's name as a candidate for graduation speaker violated his constitutional rights. As the Court of Appeals held, however, in vacating the District Court's judgment, Fraser's claim on that issue was moot. By the time of the appeal, Fraser had already won the election of graduation speakers as a write-in can-

didate and had given the speech with the District Court's order. There was no relief petitioners could have sought or been denied on appeal.

The issue is not saved from mootness, as petitioners claim, because the trial court awarded him damages in the amount of $278.[70] Those damages were calculated as the cost of one teacher's salary at Bethel High School for two days of school, JA 89, to approximate the value or replacement cost of the lost education. Nothing was included for the threatened deprivation of a right to speak at graduation. Accordingly, petitioners have no stake in the outcome of this issue, and any ruling would be purely advisory.[71]

Petitioners also ask this court to review the District Court's ruling on an issue of state law. Pet. Br. 38-41. However, since the Court of Appeals has not yet considered this issue, the Court should decline to rule upon it.[72]

---

70. Nor does the fact that the District Court awarded a judgment of costs and attorney fees, which presumably rests partially on this basis, prevent this issue from being moot on appeal. Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir. 1980); Williams v. Alioto, 625 F.2d 845, 847-48 (9th Cir. 1980); Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1290 (8th Cir. 1982); Walling v. Reuter Co., 321 U.S. 671, 677 (1944).

71. In any event, the district court was plainly correct. Free speech is a fundamental right and cannot be restricted as a form of punishment. Procunier v. Martinez, 416 U.S. 396 (1974) (First Amendment rights of prisoners may not be abridged as a form of punishment); Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

72. Labor Board v. Sears, Roebuck & Co., 421 U.S. 132, 163-64; *see* Adikes v. Kress & Co., 298 U.S. 144, 174 n.2; *see also* Ramsey v. United Mine Workers, 401 U.S. 302, 312.

In addition, since the point involves only an issue of state law of general importance, its consideration by this Court would be inappropriate.[73]

CONCLUSION

For the reasons stated above, Fraser respectfully urges the Court to affirm the judgment of the Court of Appeals. In the event the Court rules in favor of the petitioners on each issue that it considers, the Court must remand the case for consideration of other grounds which would support the result reached below. Neither the District Court nor the Court of Appeals ruled upon all of the constitutional grounds argued by Fraser which support the result reached by the District Court.

Respectfully submitted,

SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY, P.S.

JEFFREY T. HALEY
Counsel of Record

CHARLES S. SIMS
American Civil Liberties Union

73. *See generally* Stern and Gressman, *Supreme Court Practice*, at 282-84 (1978) (citing cases).

ADDENDUM

Selected Examples Of Sexual Metaphor And Puns In Literature Commonly Taught In High School Curricula

SHAKESPEARE:

Samsom: I will be cruel with the maids, and cut off their heads.

Gregory: The heads of the maids?

Samsom: Ay, the heads of the maids, or their maidenheads; take in what sense thou wilt.

Gregory: They must take it in sense that feel it.

Samsom: On me they shall feel while I am able to to stand; and 'tis known I am a pretty piece of flesh.

Romeo and Juliet, I. i. 22-29.

Nurse: (When asked the time) The bawdy hand of the dial is now upon the prick of noon.

Romeo and Juliet, II. iv. 119.

Peter (to Nurse): I saw no man use you at his pleasure; if I had, my weapon should quickly have been out, I warrant you! I dare draw as soon as another man . . . .

Romeo and Juliet, II. iv. 158-160.

Mercutio: Why, is not this better now than groaning for love? . . . for this drivelling love is like a great natural, that runs lolling up and down to hide his bauble in a hole . . . Thou desirest me to stop in my tale against the hair?

Benvolio: Thou wouldst else have made thy tale large.

Mercutio: O, thou art deceived! I would have made it short, for I was come to the whole depth of my tale, and meant indeed to occupy the the argument no longer.

Romeo and Juliet, II. iv. 91-101.

Nurse (to Romeo): Stand up, stand up; stand, and you be a man,
For Juliet's sake, for her sake, rise and stand.

Romeo and Juliet, III. iii. 89-90.

Hamlet: Lady, shall I lie in your lap?

Ophelia: No, my lord.

Hamlet: I mean, my head upon your lap.

Ophelia: Ay, my lord.

Hamlet: Do you think I meant country matters?

Ophelia: I think nothing, my lord.

Hamlet: That's a fair thought to lie between maids' legs.

Hamlet, III. ii. 119-125.

To serve bravely is to come halting off.

Henry, IV, Part II, II. iv. 49-50.

For, thou betraying me, I do betray
My nobler part to my gross body's treason;
My soul doth tell my body that he may
Triumph in love; flesh stays no farther reason;
But, rising at thy name; doth point out thee
As his triumphant prize. Proud of this pride,
He is contended thy poor drudge to be,
To stand in thy affairs, fall by thy side.
No want of conscience hold it that I call
Her 'love' for whose dear love I rise and fall.

Sonnet 151.

See generally Eric Partridge, *Shakespeare's Bawdy* (London 1948)

MELVILLE:

> Had you stepped on board the Pequod at a certain juncture of this post-mortemizing of the whale . . . you would have scanned with no small curiosity a very strange, enigmatical object . . . Not the wonderous cistern in the whale's strange head; not the prodigy of his unhinged lower jaw; not the miracle of his symmetrical tail; none of those would so surprise you as half a glimpse of that unaccountable cone,—longer than a Kentuckian is tall, nigh a foot in diameter at the base, and jet-black as Yojo, the ebony idol of Queequeg. And an idol, indeed, it is . . .
>
> Look at the Sailor, called the mincer, who now comes along, and . . . heavily hacks the grandissimus . . . and . . . staggers off with it as if he were a grenadier carrying a dead comrade from the field. Extending it upon the forecastle deck, he now proceeds to . . . give it a good stretching, so as almost to double its diameter . . . and then cutting two slits for armholes at the other end he lengthwise slips himself bodily into it. The mincer now stands before you in the full canonicals of his calling . . . Arrayed in decent black; occupying a conspicuous pulpit; intent on bible leaves; what a candidate for an archbishoprick . . . !

Moby Dick, Chapter 95 ("The Cassock").